

APR 29 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZHONG LI,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 06-70449

Agency No. A096-063-340

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 13, 2009^{**}

Before: GRABER, GOULD, and BEA, Circuit Judges.

Zhong Li, a native and citizen of China, petitions pro se for review of the Board of Immigration Appeals' ("BIA") order denying his motion to reopen proceedings to reissue its August 3, 2005 order dismissing his appeal from an immigration judge's denial of his application for asylum, withholding of removal,

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

and protection under the Convention Against Torture. We have jurisdiction under 8 U.S.C. § 1252. Reviewing for abuse of discretion, *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008), we grant the petition for review and remand for further proceedings.

As a preliminary matter, we reject the respondent's contention that Li has waived challenge to the denial of his motion to reopen. *See Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (“[W]e may review an issue . . . if the failure to raise the issue properly did not prejudice the defense of the opposing party.”) (quotation and citation omitted).

The BIA abused its discretion by failing to specifically address Li's allegation that he did not receive notice of the BIA's August 3, 2005 order. *See Singh v. Gonzales*, 494 F.3d 1170, 1172-73 (9th Cir. 2007) (presumption of proper mailing may be overcome by evidence of non-receipt by petitioner or counsel). We remand for the BIA to address Li's allegation of non-receipt in the first instance and determine whether it is sufficient to overcome the presumption of mailing. *See id.*

PETITION FOR REVIEW GRANTED; REMANDED.